No. 589

IN THE

Supreme Court of the United States

FRANK TOT,
Petitioner,
Appellant below,

vs.

UNITED STATES OF AMERICA,
Respondent,
Appellee below.

PETITION FOR WRIT OF CERTIORARI, AND BRIEF IN SUPPORT THEREOF.

FREDERIC M. P. PEARSE,
Attorney for and of Counsel with Petitioner

INDEX.

PAGE

PETITION FOR WRIT OF CERTIORARI:

Summary Statement of the Matter Involved.... 1
Questions Presented 3
Statement of the Case 4
Statutes Involved 5
Reasons for Allowance of a Writ 5

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI:

Opinion of the Court Below 9
Jurisdiction 9
Statement of the Case 10
Argument 10
(a) The search of petitioner's home and the seizure therein of a pistol was violative of his rights under the Fourth and Fifth Amendments 10
(b) The Circuit Court of Appeals did not properly construe the meaning of the Statute.. 11
(c) The Statute violates the Second Amendment 13
(d) The Circuit Court of Appeals so misconceived the facts that its conclusion that the motions for directed verdicts were properly denied is erroneous 14
(e) The Statute violates the due process clause of the Fourteenth Amendment 16
CONCLUSION 18

Cases Cited.

	PAGE
Agnello v. *United States*, 279 U. S. 20	10
Amos v. *United States*, 255 U. S. 313	10
Bailey v. *Alabama*, 219 U. S. 219	15
Byar v. *United States*, 273 U. S. 28	10
Carroll v. *United States*, 267 U. S. 132	10
Dukes v. *United States*, 275 U. S. 142	10
Go Bart v. *United States*, 282 U. S. 344	10
Gouled v. *United States*, 255 U. S. 298	10
Heiner, Collector of Internal Revenue v. *Donnan*, 285 U. S. 312	15
Lefkowitz v. *United States*, 285 U. S. 452	10
Manley v. *Georgia*, 279 U. S. 1	15
McFarland v. *American Sugar Refining Co.*, 241 U. S. 79	16
Mobile Jackson & Kansas City R. R. Co. v. *Turnipseed*, 219 U. S. 35	15
Morrison v. *People of State of California*, 291 U. S. 82	15
Presser v. *Illinois*, 116 U. S. 252	13
Ruggles v. *Illinois*, 108 U. S. 526	12
State v. *Besuick*, 13 R. I. 211	16
State v. *Grummett*, 33 Idaho 203	16
State v. *Katz*, 13 R. I. 528	16
Taylor v. *United States*, 286 U. S. 1	10
United States v. *Cruikshank*, 92 U. S. 533	13
United States v. *Goldberg*, 168 U. S. 95	12
United States v. *Miller*, 307 U. S. 174	13
Weeks v. *United States*, 232 U. S. 383	10
Western R. R. Co. v. *Henderson*, 279 U. S. 639	16

Supreme Court of the United States

FRANK TOT,
Petitioner,
Appellant below,

vs.

UNITED STATES OF AMERICA,
Respondent,
Appellee below.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States.

Your petitioner respectfully shows:

I.

Summary Statement of the Matter Involved.

1. This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit on the grounds that among the questions involved is one of vital interest to the administration of justice involving a construction of Federal Firearms Act of 1938, 15 U. S. C. 902f; another involving a determination of the proof necessary to overcome a presumption created by a statute and a third involving a question of unlawful search and seizure and two other questions involving the constitutionality of the statute. The decision of the Circuit Court of Appeals on these questions is in conflict with decisions of

other Circuit Courts and this Honorable Court and is contrary to the weight of authority.

2. Petitioner was indicted in the United States District Court for the District of New Jersey on an indictment containing one count which charged that petitioner, being a person who had previously been convicted of crime, did on September 22, 1938 receive a certain pistol which had been shipped and transported in interstate commerce to the City of Newark, New Jersey, contrary to the terms of the Federal Firearms Act, 15 U. S. C. 902f.

3. The pistol referred to in the indictment was seized by Federal Officer while searching petitioner's home after his arrest therein.

4. Before the trial a motion was timely made on petitioner's behalf for the suppression and the return of the pistol seized during the search of his home; objection was made to its admission at the trial; a motion was made at the end of the government's case to strike the pistol from evidence; before the trial a motion was made to quash the indictment on the ground that the statute under which it was brought was unconstitutional; a motion was made at the end of the government's case to dismiss the indictment and direct a verdict of not guilty on the ground that no proof was offered to show that the pistol was ever anywhere but in the State of New Jersey and the further ground that the pistol was not a firearm within the meaning of the Federal Firearms Act; at the end of the case a motion was made for a directed verdict on the same grounds urged at the end of the government's case and upon the further ground that the presumption created by the statute had been overcome by the testimony offered on petitioner's

behalf and therefore there was nothing for the jury to decide. All of these motions were denied.

5. The jury returned a verdict of guilty and petitioner moved to set this verdict aside on the ground that the pistol involved was not a firearm within the meaning of the act under which the charge was laid and the further ground that the evidence offered by petitioner at the trial had rebutted the presumption created by the statute and therefore the trial court should not have submitted the case to the jury. This motion was denied and petitioner was sentenced to three years imprisonment.

6. An appeal from this judgment was taken to the United States Circuit Court of Appeals for the Third Circuit which affirmed the judgment of the District Court on October 28, 1942.

II.

Questions Presented.

The questions presented are:

1. Whether or not the Federal Firearms Act of 1938, 15 U. S. C. 902f is constitutional.

2. Whether or not the search of petitioner's house and the seizure therein of a pistol was a violation of the rights guaranteed to him under the United States Constitution.

3. Whether or not where the undisputed evidence shows that petitioner received the pistol in intrastate commerce the case may nevertheless be submitted to the jury because of a statutory presumption.

4. Whether or not the gun involved was one referred to in the statute.

III.

Statement of the Case.

On the morning of September 22, 1938 four agents of the Federal Bureau of Investigation armed with a warrant for the arrest of Frank Tot, which warrant charged him with the theft of cigarettes from an interstate shipment, went to his dwelling house and placed him under arrest. After his arrest the agents proceeded to search his home.

At the time the defendant was arrested he was in the kitchen of his home. While the search of his home was being made and while the defendant was either in the kitchen or the bedroom inquiry was made of him as to whether or not he had a gun in the house. He replied in the affirmative; told the agents where it was; and they found a 32 Colt automatic pistol in the pocket of a coat hanging in a wardrobe closet.

Defendant Frank Tot claimed that the pistol had been in his possession since 1933 or 1934.

He had previously been convicted of a crime of violence.

The pistol did not have a firearm muffler or silencer attached to it nor was it so constructed that one could be so attached.

IV.

Statutes Involved.

15 U. S. C. 902f.

> "It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this chapter."

15 U. S. C. 901-3.

> "The term 'firearm' means any weapon, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosive and a firearm muffler or firearm silencer or any part or parts of such a weapon."

V.

Reasons for Allowance of a Writ.

1. The Circuit Court of Appeals in effect decided that Congress may enact legislation that infringes the rights guaranteed to persons under the Second Amendment to the Constitution of the United States.

The decision of the Circuit Court of Appeals conflicts with the decisions of *U. S.* v. *Cruikshank*, 92 U. S. 533; *Presser* v. *Illinois*, 116 U. S. 252 and other representative cases

and authorities cited in our argument which hold that thes rights cannot be infringed by Congress.

2. The Circuit Court of Appeals in effect decided that even if a statute is clear and unambiguous on its face you may go back of the statute in order to place a construction on it most unfavorable to the accused.

The decision of the Circuit Court of Appeals conflicts with the decision of *Ruggles* v. *Illinois*, 108 U. S. 526, and other representative cases and authorities cited in our argument which hold that a statute should be given the construction most favorable to the accused and if it is plain, certain and unambiguous so that no doubt arises from its own terms as to its scope and meaning a bare reading suffices and interpretation is needless.

3. The Circuit Court of Appeals in effect decided that an expioratory search and seizures of a person's home and effects is permissible.

The decision of the Circuit Court of Appeals conflicts with the decisions of *Lefkowitz* v. *U. S.*, 285 U. S. 452; *Go Bart Co.* v. *U. S.*, 282 U. S. 344; *Weeks* v. *U. S.*, 232 U. S. 383; *Agnello* v. *U. S.*, 279 U. S. 20; *Amos* v. *U. S.*, 255 U. S. 313; *Duke* v. *U. S.*, 275 U. S. 142 and other representative cases cited in our argument which hold that general exploratory searches are unreasonable and are forbidden by the Fourth Amendment; that a warrant for the arrest of a person does not give the holder of the warrant the right to search the home of the accused after making the arrest; and that peaceful submission to a search after arrest is not a waiver of one's constitutional rights.

4. The Circuit Court of Appeals misconceived the effect of a statutory presumption and disregarded the uncontra-

dicted facts and considering the case on these erroneous assumptions held that the motions for directed verdicts were properly denied.

In failing to consider the case on the facts before it, in giving the statutory presumption greater effect and weight than should have been given to it and in rendering its decision based upon a presumption and not upon facts the Circuit Court has so far departed from the accepted and usual course of judicial proceedings that this Court should exercise its powers of supervision over the decision below.

5. The Circuit Court of Appeals refused to take into consideration the time element involved in the case and the likelihood that one who had a criminal record would in all probability have had in his possession a pistol for a great deal longer period of time than the two month period that passed between the effective date of the statute and the date of arrest.

In failing to consider this element the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings that this Court should exercise its powers of supervision over the decision below.

6. That the Circuit Court of Appeals in effect decided that the presumption created by the statute involved operated to deny a defendant an opportunity to rebut it.

The decision of the Circuit Court of Appeals conflicts with the decision of *Bailey* v. *Alabama*, 219 U. S. 219; *Manley* v. *Georgia*, 279 U. S. 1; *Mobile* v. *Turnipseed*, 219 U. S. 35, and other cases cited in our argument which hold that a statute which creates a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment.

7. That the Circuit Court of Appeals in effect decided that there was a rational relation between the fact proved and the ultimate fact presumed.

The decision of the Circuit Court of Appeals conflicts with the decision of *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79; *Western R. R. Co.* v. *Henderson*, 279 U. S. 639; *Morrison* v. *California*, 291 U. S. 82, and other cases cited in our argument which hold that where a statute creates a presumption there must be a rational relation between the fact proved and the ultimate fact presumed or the statute violates the due process clause of the Fourteenth Amendment to the Constitution.

Wherefore your petitioner prays that a writ of certiorari issue out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Third Circuit, commanding the said Court to certify and send to this Court for its review and determination on a day certain to be designated, a full and complete transcript of the record and of all the proceedings of the Circuit Court of Appeals in the said case entitled in that court: *United States of America* v. *Frank Tot, Appellant*, No. 7961, October Term, 1941, to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States and that the judgment herein of the Circuit Court of Appeals be reversed by this Honorable Court and for such other and further relief as to this Court may seem proper and just.

FRANK TOT.
By FREDERIC M. P. PEARSE,
Attorney for and of Counsel
with Petitioner.

Supreme Court of the United States

FRANK TOT,
Petitioner,
Appellant below,

vs.

UNITED STATES OF AMERICA,
Respondent,
Appellee below.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals is printed on page 93 of the record.

II.

Jurisdiction.

1. The jurisdiction of this Court is invoked under Section 240 (A) of the Judicial Code as amended by the Act of February 13, 1925, C. 299, 43 Stat. 938 (28 U. S. C. 347).

2. The judgment of the Circuit Court of Appeals was entered October 28, 1942.

III.

Statement of the Case.

The facts in the case have already been related in the preceding petition under Title III.

IV.

Argument.

(a) The search of petitioner's home and the seizure therein of a pistol was violative of his rights under the Fourth and Fifth Amendments.

The federal officers entered defendant's home, placed him under arrest and then proceeded to search his dwelling house for evidence of some crime and found a pistol.

The Circuit Court of Appeals held that there was no error in the trial court's denial of defendant's motions to suppress the pistol found in defendant's home and that it was properly admitted in evidence.

In reaching its conclusion the learned court failed to follow the decision of this Court in *Lefkowitz* v. *U. S.*, 285 U. S. 452 and the decisions of *Go Bart Co.* v. *U. S.*, 282 U. S. 344; *Taylor* v. *U. S.*, 286 U. S. 1; *Carroll* v. *U. S.*, 267 U. S. 132; *Byar* v. *U. S.*, 273 U. S. 28; *Weeks* v. *U. S.*, 232 U. S. 383; *Agnello* v. *U. S.*, 279 U. S. 20; *Amos* v. *U. S.*, 255 U. S. 313; *Dukes* v. *U. S.*, 275 U. S. 142; *Gouled* v. *U. S.*, 255 U. S. 298, and other representative decisions.

The authorities hold that though a warrant of arrest permits an officer to go anywhere to search for an accused

for the purpose of arresting him it can never be used for the purpose of searching for evidence upon which to base a prosecution. Nor after making an arrest has such officer the right to make an exploratory search of the home of the one arrested, even if he be arrested there, to obtain evidence. Nor can such a search be justified as incident to the arrest.

The authorities further hold that an unlawful search can never be justified by what it brings to light nor can the results of a search which violates our constitutional guarantees ever justify the unlawful means used to find the evidence seized.

The authorities still further hold that the actions of one who after arrest does not object to a search of his premises do not amount to a waiver of his constitutional rights, for such action is merely a peaceful submission to the officer's wishes after a display of authority by the officers.

It is clear that a well defined conflict exists between the decision in the instant case and the decisions of this Honorable Court hereinbefore referred to, and it is respectfully submitted that the question involved is of such importance that it should be settled by this Court.

(b) The Circuit Court of Appeals did not properly construe the meaning of the Statute.

In defining the term "firearm" the Congressional language states that it "means any weapon * * * which is designed to expel a projectile * * * by the action of an explosive and a firearm muffler or a firearm silencer, or any part or parts of such weapon."

The pistol here in question was not equipped with a silencer or muffler nor was it possible in the condition it was at the time it was found to attach a muffler or silencer to it. Therefore it could not possibly be a part of a combination of a pistol and muffler or silencer.

The Circuit Court of Appeals held that the plain unambiguous wording of the statute was not sufficient from which to find its meaning and examined its history, the previous drafts of the act and the matters discussed at Congressional hearing to arrive at its conclusion.

In arriving at its conclusion the learned court failed to follow the decisions of this Court in *Ruggles* v. *Illinois*, 108 U. S. 526 and the decision in *U. S.* vs. *Goldberg*, 168 U. S. 95, and other representative decisions.

The authorities hold that a legislative intention to be efficient as a law must be set forth in a statute. Once so set forth the intention of Congress is to be found by the principles and rules of exposition. If the statute is plain, certain and unambiguous so that no doubt arises from its own terms as to its scope and meaning a bare reading suffices and interpretation is needless. For where there is no ambiguity in the words used there is no room for construction.

They further hold that even if a statute is ambiguous the construction to be adopted by the courts should be that most favorable to the accused.

It is clear that a well defined conflict exists between the decision in the instant case and decisions in this Court hereinbefore referred to and it is respectfully submitted that the question involved is of such importance that it should be settled by this Court.

(c) The Statute violates the Second Amendment.

The Second Amendment to the Constitution of the United States provides:

> "A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."

The arm which was the subject matter of the instant case was a 32 caliber automatic pistol.

The Circuit Court of Appeals held that the statute did not violate the Second Amendment.

In reaching its conclusion the learned court failed to follow the decisions of this Court in *U. S.* v. *Cruikshank*, 92 U. S. 533; *Presser* v. *Illinois*, 116 U. S. 252 and *U. S.* v. *Miller*, 307 U. S. 174, and other representative decisions.

The authorities hold that the right to keep arms is not a right granted by the Constitution but is a right which existed long prior to its adoption. Neither is this right in any manner dependent upon that instrument for its existence. The Second Amendment declares that the right to possess arms shall not be infringed by Congress. The Second Amendment is one of the amendments that has no other effect than to restrict the power of the National Government and it leaves to the people the duty to look for their protection against any violation by their fellow citizens of the rights it recognizes to the powers which relate to merely municipal and state legislation which powers were not surrendered or restrained by the Constitution. However if Congress enacts any law infringing upon these rights it does so in violation of the Constitutional prohibition.

Thus in *U. S.* v. *Miller, supra,* this Court held that the National Firearms Act of 1934 was not violative of the Second Amendment because of the fact that the weapons referred to were not those known to military science. However the statute here being considered is totally different from the 1934 Act, in the opinion of the Circuit Court of Appeals, in that it includes any and all guns, pistols and revolvers.

It is clear that a well defined conflict exists between the decision in the instant case and the decisions of this Court hereinbefore referred to, and it is respectfully submitted that the question involved is of such importance that it should be settled by this Court.

(d) The Circuit Court of Appeals so misconceived the facts that its conclusion that the motions for directed verdicts were properly denied is erroneous.

The proofs on the part of the government showed possession of the pistol in the defendant just short of two months after the effective date of the statute, and also proof of prior conviction of the defendant of a crime of violence.

The proofs of the defendant showed continuous possession of the pistol in the defendant from a date several years prior to the passage of the statute.

Rebuttal testimony showed that the pistol had been shipped from Connecticut to Illinois in 1919.

The Circuit Court of Appeals held that there was no error in denial by the trial court of the defendant's motions for directed verdicts or in the trial court's refusal to charge the jury as requested.

In reaching its conclusion the learned court failed to follow the decisions of this Court in *Heiner, Collector of Internal Revenue* v *Donnan*, 285 U. S. 312; *Bailey* v. *Alabama*, 219 U. S. 219; *Manley* v. *Georgia*, 279 U. S. 1; *Mobile Jackson & Kansas City R. R. Co.* v. *Turnipseed*, 219 U. S. 35; *Morrison* v. *People of State of California*, 291 U. S. 82, and other representative cases.

The authorities hold that a presumption is never evidence but is merely a legal excuse, under certain circumstances, for not offering evidence and unless rebutted it may have the force and effect of actual evidence. However, if evidence is offered which even tends to rebut the presumption then the presumption ceases to be a factor for when facts appear the presumption disappears and facts are deemed to appear when evidence is introduced from which they may be found.

In this case, when the defendant and his witnesses took the stand and testified to possession by the defendant, long prior to the passage of the act, facts appeared, the presumption quit the arena and there was nothing left to submit to the jury.

It is clear that a well defined conflict exists between the decision in the instant case and the decisions of this Court hereinbefore referred to, and it is respectfully submitted that the question involved is of such importance that it should be settled by this Court.

It is also submitted that if the Circuit Court of Appeals had considered the case on the facts before it it would have been obliged to reverse the conviction and in considering presumed matter after facts appeared and the presump-

tion had no further place in the case the court has so far departed from the accepted and usual course of judicial proceedings that this Court should exercise its powers of supervision over the decision below.

(e) The Statute violates the due process clause of the Fourteenth Amendment.

The Circuit Court of Appeals held that the statute did not violate the Fourteenth Amendment to the Constitution of the United States.

We do not contend that Congress cannot constitutionally set up a "statutory presumption".

We do contend that where Congress sets up such a presumption there must be some (1) rational relation between the fact proved and the ultimate fact presumed; and (2) that the presumption set up must not preclude one from the right to present his defense to the main fact so presumed.

We do contend that the presumption set up in the act of Congress here considered fails to square with these limitations.

The decision of the Circuit Court of Appeals conflicts with the decisions of *Bailey* v. *Alabama, supra, McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79; *Manley* v. *Georgia, supra; Western R. R. Co.* v. *Henderson*, 279 U. S. 639; *Morrison* v. *California, supra;* and further, *State* v. *Besuick*, 13 R. I. 211; *State* v. *Katz*, 13 R. I. 528; *State* v. *Grummett*, 33 Idaho 203.

We submit that Congress is without constitutional power on the basis of mere possession of a firearm within a

State—a fact that the State has not made, and that Congress has not made, and could not make, a substantive offense—to set up a presumption that the arm possessed was shipped, transported or received "as the case may be" in interstate commerce.

The statutory presumption here involved not only provides for a presumption of shipping or transporting and receipt of the arm in interstate commerce from the unrelated fact of intrastate possession but also, in the opinion of the Circuit Court of Appeals, for a presumption as to the time of such receipt in interstate commerce.

The Circuit Court of Appeals held in effect that "possession" provides a basis for presumption that (a) the firearm was shipped in interstate commerce; (b) was received in interstate commerce, and (c) that it was so received after the effective date of the statute.

Surely there is no reasonable relation between the fact of possession on September 22, 1938 and the fact presumed of receipt in interstate commerce after the effective date of the statute, July 30, 1938, especially when the only scintilla of proof of interstate shipment relates to a date nineteen years earlier. Even the common law presumption arising from mere possession of stolen goods is limited to goods recently stolen.

We submit that if the statutory presumption here involved is sanctioned the door will be opened wide to deprive due process of substance and to break down the line which the Constitution drew between the powers granted to the Nation and those reserved to the States, through resort to devious "techniques".

It is clear that a well defined conflict exists between the decision in the instant case and the decisions of this Court and it is respectfully submitted that there is a serious Constitutional question here involved that is of such importance that it should be decided by this Court.

Conclusion.

Your petitioner respectfully submits that the questions presented by the foregoing petition show a well defined conflict exists, between the decision of the Circuit Court of Appeals and the decisions of this Honorable Court and that there are involved important questions of constitutional and federal law which have not been but should be decided by this Court, and that these questions should be reviewed by this Court.

Respectfully submitted,

FREDERIC M. P. PEARSE,
Attorney for and of Counsel with
Petitioner.